

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

ORIGINAL

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
Llano and Marble Falls, Texas

) MM Docket No. 95-49
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MAR 22 1996

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**COMMENTS ON LETTER OF
MAXAGRID BROADCASTING CORPORATION**

On March 11, undersigned counsel received a copy of a letter dated March 6, 1996, from Maxagrid Broadcasting Corporation ("Maxagrid"), to Aileen Pisciotta, Chief of the Planning and Negotiations Division of the International Bureau of the Federal Communications Commission, relative to the above-captioned proceeding. As noted in the Maxagrid letter, the above proceeding is a contested proceeding with a mutually exclusive counterproposal filed by Roy E. Henderson and with Comments in Opposition to the original Maxagrid proposal filed by the Kirkman Group, Inc.. As a party to this proceeding, Roy E. Henderson ("Henderson"), by his counsel, hereby submits his Comments on the matters disclosed in the Maxagrid letter. In support whereof, the following is submitted:

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We believe it fair to characterize the Maxagrid letter to the Chief of the International Bureau of the FCC to be substantive in nature (in the very first paragraph it refers to its proposed new community of license as being "a substantial community but [which] lacks a local service", allegations which we believe are both contested in Docket 95-49) which then devotes itself in the letter to the importance of Mexican concurrence to the change proposed by Maxagrid and to treaty obligations and procedures that apply to obtaining such concurrence.

It is obvious that should the Maxagrid proposal be rejected outright by the FCC based upon its own determination that it may not be in the public interest (since e.g. grant of the proposal would require the removal of an existing community's only service) or if the FCC finds the Henderson proposal to be preferable to that of Maxagrid, the need for Mexican concurrence would be moot and a useless act. It is also clear that the necessity of Mexican treaty concurrence is only a matter to be resolved if the Maxagrid proposal is adopted.

With that background we have substantial concern as to the references in the Maxagrid letter to various conversations that Maxagrid has had with FCC personnel regarding this case and whether such conversations are consistent with the Commission's ex parte restrictions as set forth in Section 1.1202 et. seq. of the Commission's rules. See also Press Broadcasting Company, Inc. v. FCC, 59 F. 3d 1365 (D.C. Cir. 1995). We are most concerned

with the references in the letter to Maxagrid's

"conversations [plural] with International Bureau staff members, including Mr. James Ballis (who has been extremely cooperative)"

We do not know what the substance of such conversations were nor the number of them and we submit that the burden is on Maxagrid to supply the Commission and the parties to this proceeding with a further showing as to exactly how many conversations took place, the time, date, and length of such conversations, the subject matter discussed in such conversations, and whether Maxagrid informed FCC personnel that this was a contested proceeding or had any reason to believe that FCC was aware it was a contested proceeding.

We would note here that the FCC rules governing ex parte communications are set forth in some detail both in proceedings that are covered and in what is considered as a prohibited "presentation". In that respect we note that while a communication which is an inquiry or request for information relating solely to the status of a proceeding is exempt and not considered as an ex parte presentation, Section 1.1202 goes on to plainly state the following is a prohibited ex parte presentation:

A status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing, of a proceeding is a presentation.

Moreover, the applicability of the ex parte rules to contested Rulemaking allocation proceedings was not only a matter recognized in the original Notice of Proposed Rulemaking (which at paragraph 4 of the Appendix cautioned those filing to serve their comments upon the other parties to the proceeding) but is contained in a direct form in Section 1.1204(a)(2)(i)(ii) and i.1208(c)(2) which specifically states that the ex parte rules apply

"at the time of adoption of the Notice of Proposed Rulemaking or the filing of an opposition to a petition for rulemaking, whichever is earlier".

In sum, we submit that it is clear that this proceeding is subject to the restrictions of the Commission's ex parte rules and has been so covered since May 1, 1995, when the Notice of Proposed Rulemaking was issued. It also seems clear that Maxagrid has had several conversations with FCC personnel relative to matters addressed in the NPR, the importance to Maxagrid and its rulemaking proposal of successful determination of such matters, and the importance of the timing of securing such action for Maxagrid.

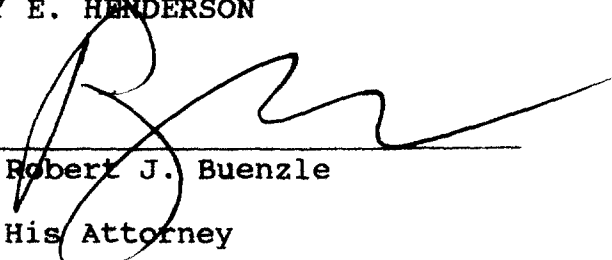
As such, we submit that a threshold question has been raised as to the character and content of any and all such private communications that Maxagrid has had with FCC personnel relative to matters in this case and we request Maxagrid to provide to the Commission and to the parties the necessary further information relative to these contacts as required for a further determination based on such facts, and failing such voluntary

submission of that information, we would request the Commission to direct Maxagrid to supply such further information and explanation as to why such contacts would not be prohibited by the ex parte rules.

Respectfully submitted,

ROY E. HENDERSON

by


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His Attorney

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March 22, 1996

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March 6, 1996

VIA HAND DELIVERY

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RECEIVED
MAR 11 1996
LAW OFFICES R.J. BUENZLE

Re: Petition for Rule Making
Radio Station KBAE(FM),
Channel 284C3,
Llano, Texas
Maxagrid Broadcasting Corporation
MM Docket No. 95-49

Dear Ms. Pisciotta:

Our client, Maxagrid Broadcasting Corporation, seeks to improve the licensed facilities of Class C3 FM Broadcast station KBAE. Specifically, Maxagrid desires to relicense station KBAE from Llano, Texas to Marble Falls, Texas. Marble Falls is a substantial community but lacks a local service. As part of the proposal, to comport with the Commission's technical requirements as regards spacing and city-grade service, Maxagrid seeks to shift the station's operating frequency by 200 kHz, from Channel 284C3 to Channel 285C3.

On November 14, 1994, Maxagrid filed a Petition with the Commission asking for the initiation of a rule making seeking to modify the FM Table of Allotments, § 73.202, and asking for modification of KBAE's license consistent with the above. The Mass Media Bureau issued a Notice of Proposed Rule Making and Order to Show Cause in response to Maxagrid's Petition for Rule Making. Llano and Marble Falls, Texas, 10 FCC Rcd 4913 (May 1, 1995). Paragraph 5 of the NPRM noted that "[s]ince Marble Falls is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence of the Mexican government has been requested. Two parties other than Maxagrid filed Comments in response to the NPRM.¹ The matter remains pending before the Allocations Branch of the Mass Media Bureau.

¹The Kirkman Group, Inc., and Mr. Roy E. Henderson.

When first authorized as a Class C3 station, for compliance with the terms of the FM Broadcasting Treaty between the United States and Mexico then in force,² the FCC had to treat KBAE as a Class B station with regard to Mexican allotments and assignments. That is because Class C3 allotments did not exist in 1972, when the two countries adopted the prior Treaty. However, a superseding Treaty recognized the intermediate Class C3.³

The 1992 Treaty took effect in September 1994. The Commission's Public Notice announcing the effectiveness of the new Treaty, New Agreements With Mexico, Mimeo No. 44899 (September 27, 1994), stated that the new FM Treaty would "afford numerous U.S. FM stations in the border area... the opportunity to upgrade their facilities." Accordingly, to obtain authority to do exactly that, shortly thereafter, Maxagrid filed its Petition for Rule Making. However, nearly 16 months later, the proceeding is still unresolved. We understand from conversations with the staff of the Mass Media Bureau that they cannot conclude the rule making without the consent of your Division. Hence this letter.

Under the terms of the 1992 Treaty, a proposed modification to a Border Zone station:

"will be accepted if it conforms to with the technical criteria and Table 2, Minimum Distance Separation Requirements, contained in Annex 1 to th[e] Agreement, subject to the notification procedures contained in Article 8."

1992 Treaty at Article 7.2. The proposed improvement to KBAE comports with those technical criteria and with Table 2, Minimum Distance Separation requirements, contained in Annex 1 to the 1992 Treaty. Also, we understand from conversations with International Bureau staff members, including Mr. James Ballis (who has been extremely cooperative), that the proposal has been the subject of the notification procedures specified in Article 8 of the 1992 Treaty.

Under Article 8.1.1 of the 1992 Treaty, either Government may notify the other of a proposed facilities modification via registered mail. Under Article 8.1.2, the other Government shall have 60 days from the date of receipt of the registered mail notification to reply. Under Article 8.1.3, if the notified party does not respond within the time allotted, the notifying party:

will effect a new requirement in writing through the most expeditious and convenient means available for both parties, in order for the affected Administration to reply within a new 45 day period to commence at the end of the first period or to state whether it desires an additional term to render its answer. In any case, this additional term shall not exceed 45 days.

²*Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, November 9, 1972 (the "1972 FM Treaty").

³*Agreement Between The Government of the United States of America and the Government of the United Mexican States Concerning Frequency Modulation Broadcasting in the Band 88 to 108 MHz*, August 11, 1992 (the "1992 FM Treaty").

Under Article 8.1.4,

In the event that the Administration being affected does not answer within the 45-day period, or requests an additional 45-day period, then at the end of this last period, the proposal for amendment *shall be considered to have been accepted and shall be included in the Plan.*

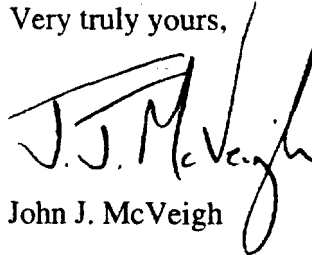
[Emphasis added.]

As we understand the situation, the International Bureau has provided all necessary notifications under Article 8 to the 1992 FM Treaty. As we further understand the situation, the Mexican Authorities have not objected to the KBAE proposal. The Mexican Administration has not explicitly approved the facilities change, either. However, in light of Article 8.1.4 of the 1992 Treaty, explicit approval from the Mexican Authorities is not needed. Because the Mexican Authorities neither objected to the proposal within 45 days of the second notification nor asked for a further 45 days to study the proposal, under the express terms of the 1992 Treaty, the FCC must deem the Mexican Administration to have accepted the proposal, and the rule making is — and has been — ripe for resolution.

It is well settled that the FCC staff must conform to the provisions of a controlling treaty in the processing of an application. Kerr County Broadcasting, 4 FCC Rcd 5021 (1989); Domega Broadcasting Corp., 4 FCC Rcd 1450 (1989); Kerrville Radio, 2 FCC Rcd 3441 (1987). We therefore respectfully request that the International Bureau advise the Mass Media Bureau, at the earliest possible moment, that an immediate resolution of the rule making comports with the controlling provisions of the 1992 Treaty.

Please advise us of the action you take with respect to this matter.

Very truly yours,



John J. McVeigh

ccs: Ms. Pamela Blumenthal, Allocations Branch,
Policy & Rules Division,
Mass Media Bureau

Mr. James Ballis, Chief,
Notifications Branch,
Planning and Negotiations Division,
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Robert J. Miller, Esq.,
Counsel to the Kirkman Group, Inc.

Robert J. Buenzle, Esq.,
Counsel to Roy E. Henderson

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMENTS ON
LETTER OF MAXAGRID BROADCASTING CORPORATION have been served by
United States mail, postage prepaid this 22nd day of March, 1996
upon the following:

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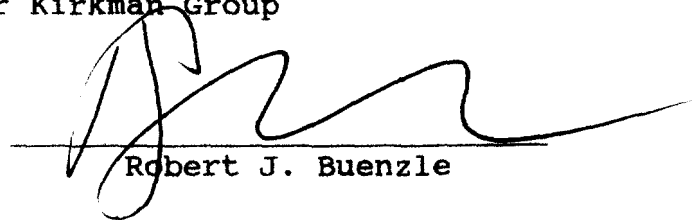
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*Hand Delivered